

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000084-001 DT

07/02/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

PATRICIA A TRACEY

v.

LAN WANG (001)

HAROLD M WALTHALL

MESA MUNICIPAL COURT - COURT
ADMINISTRATOR
MESA MUNICIPAL COURT -
PRESIDING JUDGE
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2009-074511.

Defendant-Appellant Lan Wang (Defendant) was convicted in Mesa Municipal Court of prostitution and two Mesa City Code offenses. Defendant makes the following contentions: (1) The officers did not have the legal authority to search the premises; (2) the officers did not have the legal authority to arrest her; (3) the officers failed to collect evidence; (4) the State engaged in selective prosecution; (5) the trial court erred in denying her motion for change of venue; (6) the trial court abuse its discretion in not having the prosecutor testify; (7) Defendant was entitled to a jury trial; (8) the evidence was not sufficient to support the verdicts; (9) the trial court abused its discretion in denying her motion for a new trial; and (10) she did not receive a fair trial. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On October 21, 2009, Defendant was cited for prostitution, A.R.S. § 13-3214(A). On November 3, 2009, the State filed an amended complaint charging Defendant with false reporting to a law enforcement agency, A.R.S. § 13-2907.01(A); administering a massage to a person whose anatomical parts are not covered, Mesa City Code (M.C.C.) § 5-12-9(A)(5); engaging in specified unlawful activities while giving a massage, M.C.C. § 5-12-9(A)(7).

On January 6, 2010, the State signed a document granting immunity to Thomas M. (T.M.) (R.T. of Apr. 21, 2010, at 90.) On April 21, 2010, the trial court signed an Order effectuating the terms of that document. (*Id.* at 120.)

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On January 6, Defendant filed a Motion To Dismiss contending she was the victim of selective prosecution, based on her allegation that the Mesa Police were selectively targeting Asian massage parlors and Asian females. On January 20, the State filed a response contending Defendant failed to offer any evidence supporting those allegations, and further contending the Mesa Police had arrested males and females who were not Asian, and the name of the massage parlor was not indicative of the employees' race. On June 22, the State filed a Supplemental Response.

On February 3, Defendant filed a Demand for a Jury Trial, contending she was entitled to a jury trial on all four charged misdemeanor offenses under *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005), and *Benitez v. Dunevant*, 198 Ariz. 90, 7 P.3d 99 (2000). On February 4, the State filed a response, and on February 17, Defendant filed a Reply.

On February 4, 2010, the trial court held a hearing on Defendant's Motion To Dismiss and Demand for a Jury Trial. (**Note:** The transcript has a date of 2009 for all the hearings. The Docket Sheet from the Mesa Municipal Court shows these hearings were held in 2010, thus the date on the transcript is incorrect. This Court will use the correct year of 2010 in all its citations.) For the Motion To Dismiss, Defendant contended the City engaged in selective prosecution because it charged her (an Asian female) and did not charge the male customer. (R.T. of Feb. 4, 2010, at 2–4.) Detective Devin Elmer testified he had been on the Massage Parlor Task Force since August 2009, and they generally did 16 inspections a week. (*Id.* at 6–8.) They would be given a list of the licensed massage parlors in the City and would select an area to inspect. (*Id.* at 8.) As a result, they would inspect some massage parlors that had in their names terms or references to Asian culture, and some that did not. (*Id.*) They also inspected massage parlors that had terms or references to Asian culture and employed Hispanic and Caucasian females. (*Id.* at 8–9.) He further remembered inspecting a massage parlor that was owned by a male, but he never encountered a male employee. (*Id.* at 9–10, 16, 25.) On various occasions, they had arrested Hispanic females working in massage parlors. (*Id.* at 13, 15–16.) He knew of no non-Asian female who was engaged in prostitution but not charged with that offense. (*Id.* at 17–18, 19.) For the Thai Day Spa he inspected on October 22, 2009, he had no idea who was inside that establishment before they did their inspection. (*Id.* at 19.) After arguments of the attorneys, the trial court took the matter under advisement. (*Id.* at 37.) The trial court also put off until later considering the Demand for a Jury Trial. (*Id.* at 44.)

On February 23, Defendant filed a Motion To Change Venue/Location contending (1) the Assistant City Prosecutor, Patricia A. Tracy, was a witness based on the immunity that was provided to the State's witness, thus the entire Mesa City Prosecutor's Office was tainted and any trial prosecuted by them would be unfair, and (2) the City of Mesa was actively pursuing a "campaign" against massage parlors and thus Defendant would not be able to receive a fair trial in the Mesa City Courts. On March 8, the State filed a Response.

On March 4, Defendant filed a Motion To Suppress contending the police officers had entered the Thai Day Spa without a warrant, and the officers did not have probable cause to arrest her. On March 15, the State filed a Response.

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On April 1, Defendant filed a Second Motion To Dismiss contending (1) the officers did not have probable cause to arrest her, (2) the officers failed to collect evidence Defendant contended would exonerate her, and (3) the prosecutor failed to disclose certain witnesses and documents. On April 12, the State filed a Response. On April 14, Defendant filed a Motion To Compel, and on April 20, filed a Second Motion To Compel, both of which asked the trial court to order the State to disclose certain information.

On April 21, the trial court held a hearing on pending motions. After hearing arguments, the trial court denied Defendant's motion to compel the prosecutor to testify as a witness. (R.T. of Apr. 21, 2010, at 81–82, 91–92, 107–09.) The trial court also denied Defendant's Motion To Change Venue/Location, and Defendant's Motion To Suppress. (*Id.* at 92, 108–09, 113, 170.) The trial court took under advisement Defendant's Demand for a Jury Trial. (*Id.* at 113–18.)

The trial court then addressed Defendant's second Motion To Dismiss and two Motions To Compel. (R.T. of Apr. 21, 2010, at 118.) T.M. testified he went to a massage parlor at 1245 West Baseline Road on October 22, 2009. (*Id.* at 126.) After he left that location, he was contacted by a police officer and said he had a massage. (*Id.* at 131, 137, 141.) T.M. later told the officer he received a massage and a hand job. (*Id.* at 144.) T.M. later told the officer he received a blow job. (*Id.* at 152.) On cross-examination, he said he paid \$40.00 for a ½ hour massage, then negotiated oral sex for \$80.00, after which Defendant performed oral sex on him, and then he dressed. (*Id.* at 155.) As he was about finished dressing, Defendant came back and told him the police were there. (*Id.* at 155–56.) Once he was outside, one of the officers approached him and questioned him. (*Id.* at 156–57.) T.M. told the officer he received a hand job, but acknowledged that was not the truth, which was that he received a blow job. (*Id.* at 152, 160.)

On April 21, the trial court issued an Order ruling on Defendant's Motion To Suppress, which contended the police officers entered the Thai Day Spa without a warrant, and the officers did not have probable cause to arrest her. The trial court noted the government may make warrantless searches for regulatory purposes and a person choosing to engage in a regulated business, such as a massage parlor, does so with the understanding that the government may make warrantless searches for regulatory purposes. The trial court thus held the warrantless search in this case did not violate anyone's legitimate expectation of privacy, and the officers properly seized the money they observed in plain view. (Order, dated Apr. 21, 2010, at 4–6.) The trial court therefore denied Defendant's Motion To Suppress. (R.T. of May 13, 2010, at 211.)

Also on April 21, the trial court issued an Order ruling on Defendant's Motion for Change of Venue, which contended (1) the Assistant City Prosecutor, Patricia A. Tracy, was a witness based on the immunity provided to the State's witness, thus the entire Mesa City Prosecutor's Office was tainted and any trial prosecuted by them would be unfair and (2) the City of Mesa was actively pursuing a "campaign" against massage parlors and thus Defendant would not be able to receive a fair trial in the Mesa City Courts. The trial court concluded Defendant had failed to prove the prosecutor's grant of immunity turned her into a witness, and failed to prove the City of Mesa was actively pursuing a "campaign" against massage parlors. (Order, dated Apr. 21, 2010, at 3–4.) The trial court therefore denied Defendant's Motion for Change of Venue.

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On May 3, the trial court issued an Order ruling on Defendant's Demand for a Jury Trial. It concluded (1) all charged offenses had punishments of 6 months or less, (2) there were no additional severe, direct, uniformly applied, statutory consequences, and (3) there was no common-law antecedent for any of the offenses. (Order, dated May 3, 2010, at 4–7.) The trial court therefore denied Defendant's Demand for a Jury Trial. (R.T. of May 13, 2010, at 200.)

On May 13, the trial court held another hearing on pending motions. Defendant's attorney made an oral motion to dismiss contending the State had failed to produce information about arrests, immunity, and convictions for prostitution. (R.T. of May 13, 2010, at 189–90.) The trial court said it would not rule on Defendant's motion, but instead ordered the State to produce certain material. (*Id.* at 216–17.) The trial court then proceeded to consider Defendant's Second Motion To Dismiss, which contended (1) the officers did not have probable cause to arrest her and (2) the officers failed to collect evidence Defendant contended would exonerate her. (*Id.* at 218.) Detective Elmer testified he was working as part of the Massage Parlor Task Force on October 22, 2009. (*Id.* at 200.) His team was watching a massage parlor on West Broadway where they saw a man enter the establishment and then leave a few minutes later. (*Id.* at 222.) They thought he was shopping for a particular massage service or a particular masseuse, so they followed him. (*Id.* at 222, 241–42.) He went to a massage parlor on Alma School Road, but that establishment was not open. (*Id.* at 222.) He then went to the Thai Day Spa, which was located at 1245 West Baseline Road, and went in. (*Id.* at 222.) After he had been in that establishment for a while he left, and Detective Elmer spoke to him in the parking lot and learned his name was T.M. (*Id.* at 222, 242, 249–52.) At first T.M. did not admit to engaging in any acts of prostitution, but later acknowledged receiving a hand job from the female employee inside. (*Id.* at 223, 255, 257.) T.M. said there was only one employee inside, and told Detective Elmer how much he had paid. (*Id.* at 225.) Based on T.M.'s description of the act of prostitution, the description of the woman, the fact only one woman was in the establishment, and Defendant's later inconsistent statements, Detective Elmer believed he had probable cause to arrest her. (*Id.* at 228–30, 261–64, 270–71, 278.) When Detective Elmer was inside the establishment, he saw \$80.00 on the counter, which was the amount of money T.M. said he paid, so Detective Elmer seized that money. (*Id.* at 232–33, 235, 237, 252, 265.) He looked for other possible evidence, such as used towels, but did not see any. (*Id.* at 236–37, 238, 268–69.)

Detective Elmer testified he had conducted between 100 and 110 inspections prior to October 22, 2009, had encountered both male and female employees, and employees of different ethnic descents. (R.T. of May 13, 2010, at 221.) For the inspections, his sergeant would tell them which area of the city they were to inspect that day. (*Id.* at 233–34.) He said those massage parlors had both Asian and non-Asian names, employed both Asian and non-Asian people, and employed both males and females. (*Id.* at 234–35, 253–57, 272–73.)

When the trial court resumed the hearing on June 17, the prosecutor discussed the information she had disclosed to Defendant's attorney. (R.T. of June 17, 2010, at 294–96.) Defendant's attorney contended the information was not sufficient and asked the trial court to dismiss the case. (*Id.* at 296–97.) The trial court denied Defendant's motion to dismiss. (*Id.* at 302–03.)

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Sergeant Dan Butler testified about the Massage Parlor Task Force and of the persons arrested, charged, and convicted, and the ones granted immunity. (R.T. of June 17, 2010, at 305–11.) Defendant’s attorney then argued the motion to dismiss based on selective prosecution, and the State responded. (*Id.* at 313, 315.) The trial court then took that motion under advisement. (*Id.* at 318–19.)

Defendant’s attorney then argued his motion to dismiss, which contended (1) the officers did not have probable cause to arrest her, (2) the officers failed to collect evidence Defendant contended would exonerate her, and (3) the prosecutor failed to disclose certain witnesses and documents, and the State responded. (R.T. of June 17, 2010, at 321, 326.) The trial court then took that motion under advisement. (*Id.* at 335.)

On July 15, the trial court issued an Order ruling on Defendant’s First Motion To Dismiss (selective prosecution). The trial court found Defendant had failed to establish that the State was acting in a discriminatory manner. (Order dated July 15, 2010, at 5–6.) The trial court therefore denied Defendant’s First Motion To Dismiss.

On July 19, the trial court issued an Order ruling on Defendant’s Second Motion To Dismiss (no probable cause to arrest, failure to collect evidence, and failure to disclose certain witnesses and documents). The trial court found (1) T.M.’s statement to the officers that Defendant had performed a sex act on him gave the officers probable cause to arrest Defendant, (2) the officers did not act in bad faith in their gathering of evidence, and (3) the State provided to Defendant’s attorney all material to which Defendant was entitled. (Order, dated July 15, 2010, at 6–8.) The trial court therefore denied Defendant’s Second Motion To Dismiss.

Trial began July 21, 2010. T.M. testified he went to the Thai Day Spa on October 22, 2009. (R.T. of July 21, 2010, at 354.) T.M. went into the front room; Defendant brought him into a back room; he said he wanted a ½ hour massage; and they agreed the price would be \$40.00. (*Id.* at 355–56.) T.M. took off all his clothes and was face-down on the table, and Defendant began to give him a massage. (*Id.* at 355, 357.) While T.M. was face-down on his stomach and his genitals were not covered, Defendant touched his penis. (*Id.* at 359–60.) After about 10 to 15 minutes, Defendant asked him to turn over; he pointed to his mouth with his finger; Defendant nodded her head up and down indicating “yes”; and they agreed on a price of \$80.00. (*Id.* at 357–58, 368, 371.) Defendant placed Saran Wrap on T.M.’s penis and performed oral sex on him. (*Id.* at 359–61, 390.) Once the sex act was completed, Defendant removed the Saran Wrap and gave him a towel, and then left the room. (*Id.* at 361, 384–85.) When T.M. was almost completely dressed, Defendant came back into the room, told him the police were there, and told him to tell the police he had given her only \$20.00. (*Id.* at 361.)

After T.M. testified, Officer Chris McAleer testified and the State rested. (R.T. of July 21, 2010, at 391, 434.) Defendant’s attorney moved for a judgment of acquittal, which the trial court denied. (*Id.* at 435, 440.) The State moved to dismiss with prejudice the false information count, which the trial court granted. (*Id.* at 436.) Defendant then recalled T.M., and later testified herself.

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When the parties reconvened, the trial court found Defendant guilty of prostitution and the two City Code charges. (R.T. of Aug. 31, 2010, at 474.) The trial court then entered a Judgment it had signed on August 30, 2010. (*Id.*) On September 28, 2010, the trial court entered judgments and imposed sentence on Defendant. (R.T. of Sep. 28, 2010, at 477, 481–83.) On October 6, 2010, Defendant filed a timely notice of appeal from the judgment and sentence entered September 28, 2010.

On September 28, 2010, Defendant filed a Motion for New Trial contending the trial court's verdict was contrary to the law and to the weight of the evidence. It further alleged the trial court erred in denying the following motions filed by Defendant: (1) request for a jury trial; (2) change of venue; (3) to have the prosecutor testify; (4) to dismiss the complaint because of an improper date; (5) to dismiss the complaint because of selective prosecution; (6) to dismiss due to invalid arrest (no probable cause); (7) to dismiss for failure to collect evidence; (8) to suppress due to no search warrant; (9) to dismiss for failure to make timely disclosure; (10) to suppress evidence; and (11) to dismiss for lack of speedy trial. On October 5, 2010, the State filed a response. On November 8, the trial court entered its Order denying Defendant's Motion for New Trial. On November 10, Defendant filed a notice of appeal from the judgment and sentence entered September 28, and from the trial court's Order issued November 8 denying Defendant's Motion for New Trial. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

1. *Did the trial court abuse its discretion in denying Defendant's motion to suppress.*

Defendant contends the trial court abuse its discretion in denying her motion to suppress that alleged the officers searched the premises without a warrant. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010).

Defendant contends the officers were not authorized to enter the premises without a search warrant. A warrantless search of a closely regulated business is reasonable under the following circumstances: (1) there must be a substantial governmental interest in the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspection must be necessary to further the regulatory scheme; and (3) the certainty and regularity of the application of the inspection program must provide a constitutionally adequate substitute for a warrant. *State v. Hone*, 177 Ariz. 213, 215, 866 P.2d 881, 883 (Ct. App. 1993). In the present case, the trial court found the facts supported all of these requirements. (Order, dated Apr. 21, 2010, at 4–6.) The record supports the trial court's findings, thus the trial court did not abuse its discretion in denying Defendant's motion to suppress.

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2. *Did the trial court abuse its discretion in determining the officers were legally authorized to arrest Defendant.*

Defendant contends the trial court abuse its discretion in determining the officers were legally authorized to arrest her. An officer may arrest a person for a misdemeanor without a warrant if a misdemeanor has been committed and the officer has probable cause to believe the person has committed that offense. A.R.S. § 13-3883(A)(4). The Arizona statute contains the following definitions:

5. "Prostitution" means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

....

8. "Sexual conduct" means sexual contact

9. "Sexual contact" means any direct or indirect fondling or manipulating of any part of the genitals

A.R.S. § 13-3211. It is unlawful for a person to knowingly engage in prostitution, and a person who does so is guilty of a class 1 misdemeanor. A.R.S. § 13-3214(A) & (D). In the present case, the evidence showed T.M. told Detective Elmer Defendant had given him a "hand job" and he had paid her \$80.00 for that act. Based on what T.M. told Detective Elmer, Detective Elmer had probable cause to believe Defendant had committed an act of prostitution, a class 1 misdemeanor, thus the trial court correctly found Detective Elmer had probable cause to arrest Defendant.

3. *Did the trial court abuse its discretion in determining the officers did not violate Defendant's due process rights in their collection of evidence.*

Defendant contends the officers violated her due process rights by not collecting evidence, such as the Saran Wrap and towels that were used. Generally, the state does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence. *State v. Ramirez*, 178 Ariz. 116, 132, 871 P.2d 237, 153 (1994). When the state has failed to preserve evidence the exculpatory nature of which is unknown or is only potentially exculpatory, the defendant must show the state acted in bad faith in order to show a due process violation. *State v. Lehr*, 227 Ariz. 140, 254 P.3d 379, ¶ 41 (2011). In the present case, the officer testified he saw no items, such as Saran Wrap or towels. Moreover, Defendant does not explain how Saran Wrap and towels with semen on them could be exculpatory. The trial court thus correctly found the officers did not act in bad faith and therefore correctly denied Defendant's motion to dismiss.

4. *Did the trial court abuse its discretion in determining the State had not engaged in selective prosecution.*

Defendant contends the State engaged in selective prosecution and thus the trial court abused its discretion in denying her motion to dismiss. The decision of whether to grant a defendant's motion for dismissal is within the sound discretion of the trial court, and absent an abuse

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of that discretion, the appellate court will not disturb the denial of a motion to dismiss. *State v. Hansen*, 156 Ariz. 291, 294, 751 P.2d 951, 954 (1988). Defendant presented two claims: (1) Mesa was not prosecuting the customers, who were male; and (2) Mesa police were specifically targeting Asian massage parlors and Asian females. Defendant is thus making a claim of a denial of equal protection. The Equal Protection Clause does not apply if the persons are not similarly situated. *State v. White*, 194 Ariz. 344, 982 P.2d 819, ¶¶ 38–39 (1999) (although (male) defendant and (female) codefendant were both involved in killing victim, defendant shot victim, thus defendant and codefendant were not similarly situated, so death sentence for defendant and life sentence for codefendant did not violate equal protection). Because a person who is able to engage in multiple acts of prostitution for money is not similarly situated with the person paying for an act of prostitution, charging the prostitute more severely than the customer does not violate equal protection. Further, for prostitution crimes, the State typically needs one person to testify against the other. Prosecutors have wide discretion in enforcing criminal statutes, and the mere failure to prosecute all offenders is not a sufficient basis for a successful claim of denial of equal protection. *In re Juvenile Appeal No. 74802–2*, 164 Ariz. 25, 29, 790 P.2d 723, 727 (1990). In order to prove selective and discriminatory enforcement, a party must prove the State made charging decisions based on some unjustifiable classification, such as race, religion, or some other arbitrary classification. *Id.* Because the evidence showed the State made its charging decisions based on what evidence was needed to prosecute a case, the decision to prosecute more severely the women engaging in acts of prostitution than the male customers did not violate equal protection.

For Defendant's claim relating to the persons the State did charge, the testimony presented was there were no male masseurs found to be engaging in acts of prostitution. Further, the testimony presented was the officers arrested and charged Anglo and Hispanic masseuses as well as Asian masseuses. Defendant failed to present any evidence to the contrary. The trial court therefore correctly denied Defendant's motion to dismiss for selective prosecution.

5. *Did the trial court err in denying Defendant's motion for change of venue.*

Defendant contends the trial court erred in denying her motion for change of venue. Rule 10.3 of the Arizona Rules of Criminal Procedure provides as follows:

Rule 10.3. Change of the place of trial.

a. Grounds. In any criminal case, the state or any defendant shall be entitled to a change of the place of trial to another county, if a fair and impartial trial cannot be had for any reason *other than the interest or prejudice of the trial judge.*

Rule 10.3(a), ARIZ. R. CRIM. P. (Emphasis added.) In her motion, Defendant made two claims: (1) She could not receive a fair trial in the Mesa City Courts; and (2) the prosecutor granted immunity to the customer.

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In her first claim, Defendant was essentially alleging the trial judge could not be fair and impartial. Because Rule 10.3(a) provides a party may make a motion for change of venue for any reason other than the interest or prejudice of the trial judge, Defendant's motion for change of venue was not the proper procedure to adjudicate a claim that the trial court could not be fair and impartial. The trial court therefore was correct in denying Defendant's Motion for Change of Venue based on that claim.

In her second claim, Defendant was essentially asking the trial court to disqualify the entire Mesa City Attorney's Office. If the trial court had ordered a change of venue and thus the trial would be conducted in some other city, the Mesa City Attorney's Office would still have prosecuted the case. Again, Defendant's motion for change of venue was not the proper procedure to adjudicate a claim that the Mesa City Attorney's Office should be precluded from prosecuting this case, and again the trial court was correct in denying Defendant's Motion for Change of Venue based on that claim.

6. *Did the trial court abuse its discretion in denying Defendant's motion to have the prosecutor testify.*

Defendant contends trial court abused its discretion in denying Defendant's motion to have the prosecutor testify. It is within the discretion of the trial court to decide whether to order a prosecutor to testify on behalf of a defendant, and because calling a prosecutor as a witness for the defendant inevitably confuses the distinctions between advocate and witness, and argument and testimony, that should be permitted only if required by a compelling need. *State v. Jessen*, 134 Ariz. 458, 462, 657 P.2d 871, 875 (1982), citing *State v. Tuzon*, 118 Ariz. 205, 208, 575 P.2d 1231, 1234 (1978). Defendant contends he needed the prosecutor's testimony because (1) she heard admissions Defendant made and (2) she made the decision to grant immunity to T.M.

The record does not support Defendant's contentions and shows the trial court did not abuse its discretion. Defendant does not point to where in the record it shows Defendant made admissions to the prosecutor. Further, Defendant has failed to show how she had a compelling need to have the prosecutor testify that Defendant made admissions (presumably admitting committing the charged offenses). Finally, the prosecutor admitted granting immunity to T.M., and all the ramifications of that were discussed by the trial court, the prosecutor, Defendant's attorney, T.M., and T.M.'s attorney. Defendant fails to indicate what more the prosecutor might have added.

7. *Did the trial court err in denying Defendant's request for a jury trial.*

Defendant contends the trial court erred in denying her request for a jury trial because (1) prostitution has a common-law antecedent that required a jury trial, (2) the Mesa City code offenses have common-law antecedents that required a jury trial, (3) the mandatory 15-day incarceration was a severe consequence, and (4) there were other severe consequences, such as loss of license and the possibility of deportation. A review of the authorities shows the trial court correctly denied Defendant's request for a jury trial.

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Under Arizona law, a defendant is entitled to a jury trial if the offense was the same as or similar to an offense under common law for which the defendant was entitled to a jury trial. *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147, ¶¶ 9–10, 36–37, 40 (2005). Prostitution was not, however, an indictable offense at common law. *Bailey v. United States*, 98 F.2d 306, 308 (D.C. Cir. 1938); *accord*, *State v. Lindsey*, 77 Hawaii 162, 166, 883 P.2d 83, 87 (1994); *Matthews v. State*, 68 Md. App. 282, 298, 511 A.2d 548, 556 (1986). *See also* *State v. Allen*, 2 Conn. Cir. Ct. 594, 597, 203 A.2d 248, 249 (1964); *Prout v. State*, 311 Md. 348, 365 n.8, 535 A.2d 445, 453 n.8 (Ct. App. 1988); *People v. Bailey*, 105 Misc. 2d 772, 773, 432 N.Y.S.2d 789, 791 (N.Y. Crim. Ct. 1980); *State v. Custer*, 65 N.C. 339, 339 (1871); *State v. Grimes*, 88 Or. App. 159, 163 n.5, 735 P.2d 1277, 1279 n.5 (1987); *Commonwealth v. Lavery*, 247 Pa. 139, 143, 93 A. 276, 278 (1915). Because prostitution was not an indictable offense at common law, Defendant was not entitled to a jury trial for that offense under this part of the test.

For the Mesa City code offenses, administering a massage to a person whose anatomical parts are not covered and engaging in specified unlawful activities while giving a massage, Defendant makes the following contentions: (1) these offenses are similar to keeping a house of prostitution; (2) keeping a house of prostitution (or keeping a bawdy house) was a common-law offense for which a defendant was entitled to a jury trial prior to statehood; thus (3) Defendant was entitled to a jury trial for the three Mesa City Code offenses. For two reasons, this Court concludes Defendant is incorrect in this analysis.

First, it appears the Mesa City Code offenses are not the same as, or are similar to, keeping a bawdy house or keeping a house of prostitution. The two Mesa City Code offenses are (1) administering a massage to a person whose anatomical parts are not covered and (2) engaging in specified unlawful activities while giving a massage. The common-law offense of keeping a bawdy house would be similar to keeping a house of prostitution, which is defined as follows:

A. A person who knowingly is an employee at a house of prostitution or prostitution enterprise is guilty of a class 1 misdemeanor.

B. A person who knowingly operates or maintains a house of prostitution or prostitution enterprise is guilty of a class 5 felony.

A.R.S. § 13–3208. Nowhere in § 13–3208 is there some requirement that a person keeping a house of prostitution must not administer massages to persons whose anatomical parts are not covered nor touch the person’s genitals while giving a massage. Further, under § 13–3208(A) and (B), the person who is an employee in, and the person operating, a house of prostitution does not have to be the one offering sexual service, which is a requirement of both Mesa City Code offenses. Thus those two offenses would not be similar to keeping a bawdy house or house of prostitution.

Second, even if the Mesa City Code offenses were similar to keeping a bawdy house or house of prostitution, Defendant still would not be entitled to a jury trial. As noted above, a defendant is entitled to a jury trial if the charged offense is the same as, or is similar to, a **common-law** offense for which a defendant was entitled to a jury trial before statehood. But the jury trial

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rights provided for crimes under the *territorial penal code* prior to statehood were not preserved by the Arizona Constitution, thus the fact that a defendant had the right to a jury trial for an offense under the territorial penal code does not necessarily mean a defendant is presently entitled to a jury trial. *Abuhl v. Howell*, 212 Ariz. 513, 135 P.3d 68, ¶¶ 10–11 (Ct. App. 2006) (although there may have been statutory crime of false reporting to law enforcement agency at time of statehood, there was no common-law crime, thus defendant was not entitled to jury trial under this part of test); *Phoenix City Prosecutor's Office v. Klausner (Buford)*, 211 Ariz. 177, 118 P.3d 1141, ¶¶ 9–10 (Ct. App. 2005) (defendant contended, prior to statehood, persons charged with misdemeanors were given jury trials on demand, thus he was entitled to jury trial for charge of assault; court held the fact that territorial courts granted jury trials in misdemeanor cases in compliance with territorial statutes did not mean defendants were presently entitled to jury trials); *Newkirk v. Nothwehr*, 210 Ariz. 601, 115 P.3d 1264, ¶¶ 10–12 (Ct. App. 2005) (jury trial on allegation of prior conviction was statutory right under territorial penal code, thus allegation of prior conviction had no common-law antecedent that would require jury trial on present allegation of prior conviction). The antecedent for keeping a house of prostitution under A.R.S. § 13–3208 was a statutory offense under the territorial penal code:

It shall be unlawful for any owner or agent of any owner or other person or persons, to keep or reside in any room, apartment or house of ill-fame or ill repute, or house, room or apartment resorted to for the purpose of prostitution or assignation or to let, lease or rent for any length of time whatever to any person of ill fame any house, room or structure situated 400 yards in a direct line of any school house or school room used by any of the schools in the Territory of Arizona, or within 250 yards in a direct line of any county court house, city hall or other public building in the Territory of Arizona Any person violating any of the provisions of this act is guilty of a misdemeanor.

ARIZ. PENAL CODE of 1901 § 275. This section was re-enacted after statehood. ARIZ. PENAL CODE of 1913 § 306; ARIZ. REV. CODE of 1928 § 4661; ARIZ. CODE of 1939 § 43–4407; A.R.S. of 1956 § 13–589. Thus, because keeping a house of ill repute or house of prostitution was a statutory crime under the territorial penal code and not a common-law offense in Arizona, the fact that a defendant may have received a jury trial for that offense prior to statehood does not entitle Defendant to a jury trial for the charges under the Mesa City Code.

Citing *City Court of Tucson v. Lee*, 16 Ariz. App. 449, 494 P.2d 54 (1972), Defendant contends the Mesa City Code offenses are similar to indecent exposure, for which a defendant is entitled to a jury trial, and thus Defendant was entitled to a jury trial for the Mesa City Code offenses. Indecent exposure is defined as follows:

A person commits indecent exposure if he or she exposes his or her genitals or anus or she exposes the areola or nipple of her breast or breasts and another person is present, and the defendant is reckless about whether the other person, as a reasonable person, would be offended or alarmed by the act.

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A.R.S. § 13-1402(A). For indecent exposure, the defendant is the one exposing his or her genitals, anus, areola, or nipple, and the other person is the one viewing those body parts. In the Mesa City Code offenses, the defendant is the one viewing (or touching) those body parts, and the other person is the one exposing those body parts. Thus, the Mesa City Code offenses are not similar to indecent exposure. Moreover, Defendant makes no claim she was offended or alarmed by T.M.'s exposure to her of his genitals.

Defendant contends she would face severe and direct consequences from a conviction because of the mandatory 15-day incarceration. To mandate a jury trial, the collateral consequences must approximate in severity the loss of liberty that a prison term entails. *Derendal* at ¶ 24. The minimum prison term in Arizona, which is mitigated term for a Class 6 felony, is 4 months. A.R.S. § 13-702(D). The 15 days of incarceration in jail does not approximate severity that 4 months in prison would entail. Thus, the mandatory 15-day incarceration in jail does not entitle Defendant to a jury trial.

Defendant further contends she would face severe and direct consequences from a conviction in that (1) she could lose her State Massage Therapy License and (2) she could be deported. If a defendant faces punishment of 6 months or less, the defendant is not entitled to a jury trial unless the defendant shows the conviction will result in additional severe direct consequences. *Derendal* at ¶¶ 13-26, 36-37, 40. There are, however, two qualifications for these severe direct consequences.

First, the punishment must apply uniformly to all persons convicted of that offense. *Derendal* at ¶ 25. *Buccellato v. Morgan*, 220 Ariz. 120, 203 P.3d 1180, ¶¶ 17-20 (Ct. App. 2008) (defendant was charged with city code provisions; defendant claimed additional penalty was that, if he had three convictions, city could revoke his license as adult service provider; court concluded that, because revocation of license applied only to those convicted of three or more offense, this consequence did not apply uniformly); *State v. Willis*, 218 Ariz. 8, 178 P.3d 480, ¶ 17 (Ct. App. 2008) (defendant was convicted of first-degree criminal trespass, which is domestic violence offense; although this meant defendant would be subject to minimum of 4 months incarceration in event of two future domestic violence convictions, that potential punishment would not affect equally all persons convicted of domestic violence offenses, thus this potential punishment would not entitle defendant to jury trial). In the present case, loss of a Massage Therapy License would apply only to those who have a therapy license, thus it would not apply universally to all those convicted of prostitution.

Second, the punishment must arise from Arizona statutory law. *Derendal* at ¶ 23. In the present case, assuming Defendant could be deported as a result of a conviction for prostitution, that would be a result from federal law and not from Arizona statutory law. The trial court therefore correctly denied Defendant's request for a jury trial.

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8. *Did the State present sufficient evidence to support the verdicts.*

Defendant contends the State did not present sufficient evidence to support the verdicts. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said:

We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury’s finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could accept as adequate . . . to support a conclusion of defendant’s guilt beyond a reasonable doubt.” We resolve any conflicting evidence “in favor of sustaining the verdict.”

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the trier-of-fact, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

In the present case, for the prostitution charge, T.M. testified Defendant placed Saran Wrap over his penis and then placed his penis in her mouth, and did this for an agreed price of \$80.00. For the Mesa City Code offenses, T.M. testified he was completely unclothed when Defendant gave him the massage, and Defendant touched his genitals while doing so. This Court concludes those facts were sufficient to support the verdicts.

Defendant contends, however, the evidence was not sufficient because T.M. was a “coerced admitted liar” while no evidence was ever submitted that she lied, and thus there was a conflict in the evidence. In addressing the role of an appellate court in reviewing conflicting evidence and testimony, the Arizona Supreme Court has said:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to “look over the shoulder” of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Because this issue involves “an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge” rather than a “question . . . of law or logic,” it is not appropriate for this Court to “substitute [its] judgment for that of the trial judge.”

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9. *Did the trial court abuse its discretion in denying Defendant's motion for a new trial.*

Defendant contends the trial court abuse its discretion in denying her motion for a new trial. Defendant's motion for a new trial was based on the same issues discussed above. Because this Court has concluded the trial court did not err or abuse its discretion in any of the issues discussed above, this Court concludes the trial court properly denied Defendant's motion for a new trial.

10. *Did Defendant receive a fair trial.*

Defendant contends she did not receive a fair trial because the trial court ruled against her at trial. Because this Court has concluded the trial court did not err or abuse its discretion in any of its rulings, this Court concludes Defendant received a fair trial.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not err or abuse its discretion in any of its rulings.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Mesa Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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